Supreme Court
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No. 02-559

In the
Supreme Court of the United States
October Term, 2002

JOSEPH CUTRONA, WILLIAM READDY, and STANLEY GRIFFIS,
Petitioners,

vs.

ESTATE of SHANE G. SORRELLS, By and Through Its Independent Executrix, Sheryl Thostenson, DANA FONTENOT, as Next Friend of Chandler Sorrells, a Minor, PAT SORRELLS, and RITA SORRELLS,
Respondents.

On Petition For a Writ Of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

In addition to the parties listed by Petitioners, Joseph Cutrona, William Readdy, and Stanley Griffis (sometimes the "Officers"), one other party warrants mention. The City of Dallas is the Respondent in Cause No. 02-641, a proceeding parallel to this one. In Cause No. 02-641, the Estate of Shane G. Sorrells, By and Through Its Independent Executrix, Sheryl Thostenson, Dana Fontenot, as Next Friend of Chandler Sorrells, a Minor, Pat Sorrells, and Rita Sorrells (sometimes the "Sorrells Family") petition this Court to grant a writ of certiorari to review the same Fifth Circuit opinion at issue in this cause. Unless and until this Court consolidates these two petitions, and for the sake of simplicity, the Sorrells Family refers to the two petitions as the "Officers' Petition" and the "Sorrells Family's Petition." Both Petitions address the same nexus of facts.

TABLE OF CONTENTS

Page

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6 i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REASONS FOR DENYING THE WRIT v

A. THE SORRELLS FAMILY SUFFICIENTLY PLEADED FACTS THAT PRECLUDE SUMMARY JUDGMENT AS A MATTER OF LAW REGARDING WHETHER THE OFFICERS ARE "QUALIFIEDLY IMMUNE" 1

B. REGARDLESS OF HOW THE FIFTH CIRCUIT APPLIED THE "OBJECTIVE REASONABLENESS" PRONG OF THE QUALIFIED IMMUNITY ANALYSIS, THE FIFTH CIRCUIT RULED CORRECTLY 6

CONCLUSION 7

TABLE OF AUTHORITIES

Page

Cases.

Anderson v. Creighton,
483 U.S. 635, 107 S. Ct. 3034 (1987) 2-3

Brown v. Glossip,
878 F.2d 871 (5th Cir. 1989) 1

Estate of Sorrells v. City of Dallas,
192 F.R.D. 203 (N.D. Tex. 2000) 3,5

Estelle v. Gamble,
429 U.S. 97, 97 S. Ct. 285 (1976) 4

Garner v. Tennessee,
471 U.S. 1, 105 S. Ct. 1694 (1985) 4,7

Goodson v. City of Corpus Christi,
202 F.3rd 730 (5th Cir. 2000) 4

Graham v. Connor,
490 U.S. 386, 109 S. Ct. 1865 (1989) 7

Gutierrez v. City of San Antonio,
139 F.3d 441 (5th Cir. 1998) 3-4

McQurter v. Atlanta,
572 F. Supp. 1401 (N.D. Ga. 1983) 4

Petta v. Rivera,
143 F.3d 895 (5th Cir. 1998) 2

Reyes v. Sazan,
168 F.3d 158 (5th Cir. 1999) 1

TABLE OF AUTHORITIES
(continued)

Page

Cases.

Samaad v. City of Dallas,
940 F.2d 925 (5th Cir. 1991) 2

Saucier v. Katz,
533 U.S. 194, 121 S. Ct. 2151 (2001) 6

Siegert v. Gilley,
500 U.S. 226, 111 S. Ct. 1789 (1991) 2

Tennessee v. Garner,
471 U.S. 1, 105 S. Ct. 1694 (1985) 4

Wallace v. Wellborn,
204 F.3d 165 (5th Cir. 2000), *cert. denied*,
531 U.S. 991, 121 S. Ct. 480 (2000) 2-3

Wilson v. Layne,
526 U.S. 609, 119 S. Ct. 1692 (1999) 2

Other Authority.

Const. Amend. IV 7

Const. Amend. V 7

Const. Amend XIV 7

Fed. R. Civ. P. 8 1

REASONS FOR DENYING THE WRIT

The Petition filed by the Officers raises two issues for the Court's determination. The first is whether the Fifth Circuit Court of Appeals correctly decided federal law does not entitle the Officers to invoke the affirmative defense of "qualified immunity." The Officers argue that the Fifth Circuit's opinion with respect to the qualified immunity issue is in conflict with this Court's prior decisions because the Fifth Circuit failed to determine whether the Sorrells Family:

(1) Pleaded any constitutional violation at all, as an initial matter; and,

(2) Alleged, with appropriate specificity, that federal law "clearly established" the constitutional rights at issue at the time of the incident in question.

The Sorrells Family contend that regardless of whether the Court of Appeals' exhaustively examined their pleadings in its opinion, as the Officers require, the Sorrells Family, in fact, did plead a violation of numerous clearly established constitutional violations.

The second issue that the Officers raise is whether the Fifth Circuit's decision on the qualified immunity issue is in conflict with prior decisions of this Court to the extent that it failed to address the objective-reasonableness prong of the qualified immunity analysis separately from the objective-reasonableness prong of an excessive force claim.

The Sorrells Family responds, again, that regardless of which analysis applied, the same result as to qualified immunity lies, namely, that the immunity does not shield – as a matter of law – the Officers' conduct in this case.

I.
THE SORRELLS FAMILY SUFFICIENTLY PLEADED FACTS THAT PRECLUDE SUMMARY JUDGMENT AS A MATTER OF LAW REGARDING WHETHER THE OFFICERS ARE "QUALIFIEDLY IMMUNE"

The Officers claim that, to the extent that the Fifth Circuit failed to decide the "qualified immunity" issue *after* it had resolved any pleadings issues, its decision is in conflict with the law of other circuits and of this Court.

A complaint "shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A civil rights plaintiff must plead facts with particularity and specificity to overcome a defendant official's claim of qualified immunity. *See, e.g., Reyes v. Sazan*, 168 F.3^{d} 158, 161 (5th Cir. 1999). This "[h]eightened pleading requires allegations of fact focusing specifically on the conduct of the individual who caused the plaintiff's injury." *Id.* (citation omitted). The quality of facts that the plaintiff alleges must be such that the reviewing court can determine whether no reasonable officer could have misunderstood that the defendant's actions violated federal law. *See, e.g., Brown v. Glossip*, 878 F.2d 871, 874 (5th Cir. 1989).

In order determine whether, upon sufficiently specific pleading, qualified immunity protects a given government official's conduct, a Court must determine:

(1) Whether a plaintiff has alleged a violation of a clearly established right; *and*

(2) If so, whether the defendants' conduct was objectively reasonable in light of clearly established law at the time of the alleged deprivation.

See, e.g., Wilson v. Layne, 526 U.S. 603, 609, 119 S. Ct. 1692, 1697 (1999), *Siegert v. Gilley*, 500 U.S. 226, 232, 111 S. Ct. 1789, 1793 (1991), and *Petta v. Rivera*, 143 F.3d 895, 899 (5th Cir. 1998). The first prong is purely a question of law. *Siegert*, 500 U.S. at 232, 111 S. Ct. at 1793; *see also Samaad v. City of Dallas*, 940 F.2d 925, 940 (5th Cir. 1991). In resolving this question, courts interpret the law as of the time of the incident at issue. *Wilson*, 526 U.S. at 609, 119 S. Ct. at 1697, and *Siegert*, 500 U.S. at 232, 111 S. Ct. at 1793-94.

The first – or "clearly established law" – prong can be separated further into three, distinct issues:

(1) Has the plaintiff alleged the deprivation of a constitutional right?; *if so*

(2) Was this right "clearly established" at the time of the alleged deprivation?; *and, if so,*

(3) Does the record "at least give[] rise to a genuine issue of material fact as to whether the defendants actually engaged in the conduct that violated this clearly established right"?

See, e.g., Wallace v. Wellborn, 204 F.3d 165, 167 (5th Cir. 2000), *cert. denied*, 531 U.S. 991, 121 S. Ct. 480 (2000)).

"For a right to be clearly established, 'the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039 (1987).

The second prong of the inquiry necessarily depends on the unique circumstances of each case. *Anderson*, 483 U.S. at 639-40, 107 S. Ct. at 3039-40. One circumstance that is *not* relevant, however, is the official's subjective intent. *Anderson*, 483 U.S. at 640, 107 S. Ct. at 3040. Even if he acted with malice, if his conduct was objectively reasonable, he is protected by the defense. *Gutierrez v. City of San Antonio*, 139 F.3d 441, 445 (5th Cir. 1998). Furthermore, if his conduct was objectively reasonable, he is qualifiedly immune from suit when his conduct was objectively reasonable *even if it violates federal law*. *Id.* at 445.

Finally, if this two-part analysis results favorably for the plaintiff, then the Court must consider further "whether the defendants actually engaged in the conduct that violated this clearly established right." *See, e.g., Wallace*, 204 F.3d at 167.

The Officers contend that the Sorrells Family's allegations (as stated in Plaintiffs' Original Complaint (the "Complaint")) are "conclusory, speculative, inflammatory, and fail to set forth sufficient facts." (Officers' Petition at 10.) While sheer volume of words is not dispositive of this issue, the Sorrells Family asks the Court to consider the language of the Complaint. (Officers' Petition, Appendix ("App.") at 42-59.) In 50 separate paragraphs, the Sorrells Family depicted in detail the precise nexus of facts upon which they premise their claims. (Officers' Petition, App. at 42-59.) *See Estate of Sorrells v. City of Dallas*, 192 F.R.D. 203, 208-09 & n.5 (N.D. Tex. 2000).

The Complaint specifically alleges the facts that constitute recognized actions for unconstitutional use of excessive force, use of deadly force, and failure to intervene and/or protect, *viz.*:

(1) Excessive force in general – *compare* Complaint (Officers' Petition, App. at 43-58)

with Goodson v. City of Corpus Christi, 202 F.3rd 730, 740 (5th Cir. 2000) (elements of an excessive force claim);

(2) Improper use of deadly force – *compare* Complaint (Officers' Petition, App. at 43-58) *with Tennessee v. Garner*, 471 U.S. 1, 11, 105 S. Ct. 1694, 1701 (1985) (holding that the use of deadly force is not justified to prevent an unarmed suspect from evading arrest), and *Gutierrez v. San Antonio*, 139 F.3d at 446 (holding that a chokehold is the use of deadly force); and

(3) Failure to intervene and/or protect – *compare* Complaint (Officers' Petition, App. at 43-58) *with Estelle v. Gamble*, 429 U.S. 97, 102-03, 97 S. Ct. 285, 290 (1976) (requiring a showing of "callous or conscious" indifference to "serious medical needs" by "each officer present.").[1]

Further, the Complaint specifically alleges violations of these clearly established, well-recognized standards. *First*, the Sorrells Family pleaded properly the Officers' use of OC Spray, beating, kicking, chokeholds, pinning in a prone position, and prods with a baton – singly and together – as a basis for an excessive force claim.

Second, the Sorrells Family pleaded properly the Officers' use of OC Spray, choke-holds (including the particular form of the chokehold used), beatings, kickings,

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[1] The Sorrells Family, in particular, raised a genuine issue of material fact as to whether the use of a chokehold, given the facts, constituted the use of deadly force. *See McQurter v. Atlanta*, 572 F. Supp. 1401, 1414 (N.D. Ga. 1983).

pinning in a prone position, and prods with a baton – singly and together – as a basis for an improper use of deadly force claim.

Third, the Sorrells Family pleaded properly the Officers' above-described conduct and their subsequent failure to render aid (even after Mr. Sorrells stated, "That's enough." and "I can't breathe." – and his subsequent turning blue in the face), compounded by holding him in a prone position and then prodding him in the stomach with a baton – singly and together – as a basis for a claim of failure to intervene and/or protect.

In short, the Sorrells Family met their pleading burden: they identified the precise conduct at issue.

Accordingly, regardless of whether the Fifth Circuit should have addressed the pleadings matter in some chronological fashion more suitable to the Officers' purposes, the Sorrells Family did plead sufficiently. This issue thus is of no consequence. Further, and as a practical matter, the District Court addressed the pleadings issue first and the Court of Appeals affirmed that decision. *See Estate of Sorrells v. City of Dallas*, 192 F.R.D. at 203.

In sum, the Officers are wrong when they contend that case law from this Court and that of other circuits – cases that the Court of Appeals cites in reciting the standard for qualified immunity – requires a result different from that of the Fifth Circuit. As shown above, the Fifth Circuit both correctly recited and then applied the standard for the determination of whether a government official is entitled to qualified immunity. Furthermore, whether the Fifth Circuit, or the District Court for that matter, discussed the Sorrells Family's pleadings is immaterial, because the pleadings are more than sufficient.

II.
REGARDLESS OF HOW THE FIFTH CIRCUIT APPLIED THE "OBJECTIVE-REASONABLENESS" PRONG OF THE QUALIFIED IMMUNITY ANALYSIS, THE FIFTH CIRCUIT RULED CORRECTLY

The Officers alternatively assert that the Fifth Circuit's decision on qualified immunity is in conflict with prior decisions of this Court to the extent that the Court of Appeals failed to address the objective-reasonableness prong of the qualified immunity analysis separately from the objective-reasonableness prong of an excessive force claim. In support, the Officers rely on *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151 (2001). Such an analysis, according to the Officers, would establish that their actions were objectively reasonable. The Officers do not describe or elaborate as to how this is so, however. Nor can they. No matter how the Fifth Circuit – or any other Court – applies the objective-reasonableness standards, the Sorrells Family raised enough genuine issues of material fact as to preclude summary judgment.

In *Saucier*, at issue was a different factual scenario than that of the case at bar. The officer whose conduct was at issue in *Saucier* was a military police officer charged with the protection of the Vice President of the United States. 533 U.S. at 197-198. The force used by the officer was merely to hurry a citizen away from an area and place him in a van. *Id.*

This Court held in *Saucier* that no clearly established rule was violated, and, therefore, did not reach the issue of whether the officer's conduct was objectively reasonable. 533 U.S. at 208-209.

At the time of the incident in question, Mr. Sorrells had a "clearly established" "constitutional right" not to be beaten, choke-held, kicked, neglected, OC Sprayed (an entire canister), and/or prodded with a baton while dying. *See* U.S.

Const. amends. IV, V, and XIV; *see, e.g., Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871 (1989), and *Garner v. Tennessee*, 471 U.S. at 11, 105 S. Ct. at 1701 ("fundamental interest in [one's] own life need not be elaborated upon.").

Furthermore, under either the qualified immunity analysis or the analysis under an excessive force claim, the evidence before the District Court at the very least raises a fact issue as to whether the Officers' conduct was objectively unreasonable.

CONCLUSION

In sum, the Officers raise no issue that merits review by the granting of a writ of certiorari. The Sorrells Family respectfully prays that the Court deny the Officers' their petition.

Respectfully Submitted,

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